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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 418

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, members of the Tax Commission of the State of Washington,
Appellants,

vs.

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Appellees.

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STATE PRINTING PLANT, OLYMPIA, WASH.

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STATEMENT OF THE CASE

To avoid confusion, the appellees (plaintiffs below) will be referred to herein as "plaintiffs," and the appellants (defendants below) as "defendants."

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The United States, under an Act of Congress, is engaged in the construction of the Grand Coulee Dam at a point in the State of Washington on the Columbia River, for the purpose, as the Act declares, of controlling floods, improving navigation, providing for the storage and delivery of stored water for the reclamation of public land, and the generation of electrical energy. After receiving bids for the construction of the dam, the United States, in July, 1934, entered into a contract with plaintiffs other than the Mason-Walsh-Atkinson-Kier Company whereby said plaintiffs agreed to furnish some of the materials and to perform work required for the construction of the naked dam and power plant in accordance with specifications of the Columbia Basin Project. The consideration of the contract was that said plaintiffs were to receive $29,339,301.50 for the performance of the work and such materials as were to be supplied by them, and such additional amount caused by changes to be made by the United States in the plans and specifications, which changes have increased the amount of the agreed contract price by over $7,000,000. (R. 23)

The plaintiffs are non-residents of the State of Washington, and are engaged in no business or operations in the State of Washington other than the construction of said dam. (R. 23)

The Washington legislature, at its 1935 session, enacted a general revenue law, Chapter 180, Session Laws of Washington, 1935. By Title III, such Act imposes on the purchaser a tax measured by 2% of the purchase price on all retail sales within the State subsequent to April 30, 1935, of tangible personal property other than newspapers, motor vehicle fuel (otherwise taxed), sales on re-

lief vouchers, and bread, eggs, raw fruits and vegetables, fresh milk, and certain milk products. (ch. 180, secs. 16-30, Laws of Wash., 1935)

Title IV of said 1935 Revenue Act imposes what is described as a "compensating tax" for the privilege of using within said State any article of tangible personal property purchased at retail subsequent to April 30, 1935, and measured by 2% of the purchase price and transportation cost to place of use, with an offset of any sales or use tax paid in connection therewith, either within or without the State. The tax does not apply: (1) to the use of property brought into the state by a nonresident for his use and enjoyment while within the state; nor (2) to the use of property purchased during any calendar month, the total purchase price of which is less than $20.00.

The pertinent parts of said Revenue Act are set forth in "Appendix A" (*post*, pp. 37-40).

Prior to the enactment of said 1935 Revenue Act, plaintiffs had purchased in states other than Washington, heavy machinery and equipment necessary for the construction of the dam, and during May and June, 1935, purchased in various states of the Union other than Washington, equipment, machinery and other articles which were shipped into Washington and used in the construction of the dam, the purchase price of which was $899,390.91, and the transportation cost, $21,798.43. (R. 24)

The defendants who constitute the tax commission of the State of Washington, charged with the duty of collecting the various taxes imposed by the 1935 Revenue

Act, demanded payment and threatened collection of the compensating tax from plaintiffs by reason of the use by them of said tangible personal property so purchased by them in other states in May and June, 1935. Plaintiffs instituted this suit in the United States district court for the Eastern District of Washington, Northern Division, to remove the cloud thereof from their personal property, and to enjoin the defendant tax commissioners from enforcing the collection of said tax from plaintiffs (R. 1-18) on the grounds (1) that it was extra-territorial in its operation in that the dam area belonged to, and was under the jurisdiction of the United States; (2) that in constructing the dam plaintiffs were agencies and instrumentalities of the federal government and were therefore exempt from said tax, and (3) that as applied to property purchased in other states the Compensating Tax Act constituted an unlawful burden on interstate commerce in violation of the commerce clause of the federal constitution. (R. 14-17)

Plaintiffs' application for an interlocutory injunction was heard by a statutory three-judge court under section 266 of the Judicial Code. (R. 20) At the interlocutory hearing plaintiffs expressly disclaimed any right to an injunction *pendente lite* on the first ground urged, namely, that the dam area belonged to the United States. (R. 35)

As to the second objection to the tax, the court held that as applied to plaintiffs the Act was not void as imposing a tax on a federal governmental agency since plaintiffs were independent contractors (R. 25-6), but as to the third objection raised, the court, by a two to one

decison, held the Compensating Tax Act void as violative of the commerce clause. (R. 26-30)

The court having made findings of fact and conclusions of law (R. 33-36) and entered its order adjudging the tax void and directing the issuance of an interlocutory injunction restraining its collection by the defendant tax commissioners (R. 38-39), defendants have appealed. (R. 39)

So far as appellants know, the decision of the trial court has not been officially reported, but is found in volume 15 Federal Supplement, pages 958-963.

SPECIFICATIONS OF ERROR

I

The court erred in adjudging that said Compensating Tax constitutes an unlawful burden on interstate commerce in violation of the commerce clause of the federal constitution. (R. 26-30, 42)

II

The court erred in finding and concluding that said Compensating Tax was intended to and does unlawfully discriminate against articles because of their origin in states other than Washington. (R. 26-30, 41)

ARGUMENT

Specifications I and II

Both specifications present the same inquiry, namely, does the Washington Compensating Tax Act violate the Commerce Clause? Hence, they will be discussed together.

(a) The Compensating Tax and Retail Sales Tax are imposed by the same Act, and must be construed together to discover whether either or both amount to an unlawful discrimination against interstate commerce.

In *Gregg Dyeing Co. v. Query*, 166 S. C. 117, 164 S. E. 588, it appeared that by one statute of South Carolina a tax on gasoline of 6 cents per gallon was imposed on all distributors, while another statute imposed a tax of the same amount on gasoline imported into the state and stored for use and consumption. The latter act was attacked by a dyeing establishment bringing gasoline into the state for its own use in its manufacturing processes, as violative of the commerce clause. In sustaining the tax the state court held that the two Gasoline Tax Acts should be taken together and construed in *pari materia*, and as so construed, did not discriminate against interstate commerce.

Your Honors affirmed the above decision (*Gregg Dyeing Co. v. Query*, 286 U. S. 472), saying in part (479-480):

"The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the State. The state court said that the Act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been

paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power. When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves. *Hebert v. Louisiana*, 272 U. S. 312, 317. See *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 73.''

In sustaining the Compensating Tax the State supreme court, while not expressly so holding, in effect treated the sales tax and compensating tax provisions as complementary and part of a single general plan of taxation. See *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 319-320. It could scarcely have done otherwise, since the two taxes are imposed by the same revenue measure. See *Hinson v. Lott*, 75 U. S. 148, 152-3, where a state tax on liquors brought into the state for sale was sustained because, by other sections of the same act, a like tax, though collectible in a different mode, was imposed on liquors manufactured within the State.

(b) The commerce clause is not violated by imposition of a non-discriminatory property tax on subjects of interstate commerce which have come to rest within the state. This court will determine for itself the true nature of a tax. In its practical operation, the Washington compensating tax is no more offensive to the commerce clause than is an ordinary property tax.

The items of personal property upon the use of which the compensating tax is here sought to be imposed, have become commingled with the general mass of property of the state and lost their distinctive character as articles of interstate commerce. The complaint alleges:

"All the articles so purchased were purchased to be used, and were brought into the State of Washington and used, in and about and for the purposes of the construction of the Grand Coulee Dam under plaintiffs' aforesaid contract with the United States." (R. 11)

(b-1) Commerce clause not violated by imposition of non-discriminatory property tax on subjects of interstate commerce coming to rest within State.

As soon as goods are brought into a state and become part of its general mass of property, they become liable to state taxation in the same manner as other property of similar character.

Brown v. Houston, 114 U. S. 622;
Emert v. Missouri, 156 U. S. 296;
Darnell & Son Co. v. Memphis, 208 U. S. 113;
Minnesota v. Blasius, 290 U. S. 1;
Trinityfarm Const. Co. v. Grosjean, 291 U. S. 466, 472;
Six Cos. v. De Vinney, 2 Fed. Supp. 693, 699.

(b-2) This court will determine for itself the true nature of a contested tax.

Where a federal question is involved the Supreme Court is not bound by the label attached to a tax by the legislature, or by the courts or administrative officers of

the state, but will determine for itself the true nature of the tax by ascertaining its operation and effect.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Mugler v. Kansas, 123 U. S. 623, 661;
Galveston, Harrisburg & Ry. Co. v. Texas, 210 U. S. 217, 227;
Educational Films Corp. v. Ward, 282 U. S. 379, 387;
Lawrence v. State Tax Commission, 286 U. S. 276, 279-280;
Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113, 119.

And it goes without saying, of course, that it is no less the Court's duty to look to the true substance of the tax for the purpose of sustaining it, than for the purpose of condemning it. To quote from *Lawrence v. State Tax Commission*, 286 U. S. 276, 280, sustaining an income tax act as against the claim that it offended the due process clause:

"The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax, • • • but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it."

(b-3) Construed together, the retail sales tax and compensating tax are no more burdensome to interstate commerce than is the ordinary property tax.

It is apparent, we submit, that in their effect upon interstate commerce, the Washington retail sales tax and compensating tax have all the essential attributes of a property tax.

A property tax is ordinarily fixed at a certain rate on the market value of the property. The sales and com-

pensating taxes are measured by a constant rate—two per cent—applied to the *best evidence of the property's value*, namely, its purchase price new. The sales tax is payable by the purchaser (Sec. 21, *post*, p. 38), the compensating tax by the one first using the purchased article within the state. (Sec. 34, *post*, p. 38.) Both are uniform as to application, since, with unimportant exceptions, they apply uniformly to all articles purchased after April 30, 1935.

That the sales or compensating tax is collected but once, while property taxes are imposed periodically, seems immaterial. If personalty purchased locally or purchased elsewhere and used within the state, is still in Washington on the assessment date, it is subject either to a personal property tax, or, if incorporated in fixtures, to a real property tax. Thus, in practical effect, all tangible personal property used in Washington and purchased after April 30, 1935, is subject to a sales or use tax imposed but once, and measured by 2% of its value, plus the ordinary, periodically-imposed *ad valorem* property tax.

That the effect on interstate commerce of the compensating and retail sales taxes, taken together, is no more onerous than the exaction of a corresponding property tax, becomes at once apparent when we compare the effect of the one with the effect of the other. Let us assume that, instead of the offending tax, the state of Washington, in addition to its other property taxes assessed annually, undertook to levy an *ad valorem* tax at a uniform rate upon all tangible personal property purchased after a certain time, and having its actual situs within the state. Such a tax, being both in name and effect, a true property

tax, could not be held violative of the commerce clause, yet in what way would such a tax be less burdensome on interstate commerce, than the compensating and sales taxes now before us? Obviously the tax burden is precisely the same, whether the exaction be conditioned on the purchase or use of property or on mere ownership.

In *Brown v. Maryland*, 12 Wheat. 419, a tax on the occupation of an importer was held a tax on imports obnoxious to the commerce clause, the court saying (p. 444):

"All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

And in *Cook v. Pennsylvania*, 97 U. S. 566, a tax on the amount of an auctioneer's sales was declared a tax on the goods sold.

In *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288, a tax sought to be imposed by Kentucky of 50 cents a gallon on whisky either withdrawn from bond within the state or transferred in bond from the state to points elsewhere, although described as a license tax, was held to be essentially a property tax.

In sustaining the Washington occupational tax measured by a percentage of the receipts from local business of interstate carriers and telephone companies, Your Honors said in *Pacific Tel. & Tel. Co. v. Tax Commission*, 297 U. S. 403, 413:

"In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an *ad valorem* property tax upon tangible property used exclusively in such business."

True, in *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, the state court held the compensating tax not to be a property tax within the contemplation of the state con-

stitution requiring uniformity of property taxation, and in *Morrow v. Henneford*, 182 Wash. 625, held to the same effect with respect to the retail sales tax. But as above noted, in passing upon a federal question, this court is not bound by the particular name placed upon a contested tax by the state courts,—and for this reason:

The Supreme Court's conclusion as to whether a given state tax offends the commerce clause must, of necessity, be of uniform application in each of the several states. Let us suppose this identical compensating tax measure appeared on the statute books of each of two states. Would this court adjudge invalid as violative of the commerce clause the statute of the one state because its courts had declared such tax to be an excise, and sustain the identical statute of the other because called by the courts of that state, a property tax? Obviously not. The effect of a state tax on interstate commerce cannot, we submit, be influenced by the particular label placed upon such tax by the local courts. The same law must be as inoffensive or obnoxious to the commerce clause in California as in Oregon.

The identical question arose in *Eastern Air Transport Inc. v. South Carolina Tax Commission*, 52 Fed. (2d) 457 (affirmed: 285 U. S. 147, 152), where, although a sales tax had been held by the state supreme court not be a property tax within the meaning of the state constitution, the three-judge district court nevertheless held that, for the purpose of determining questions arising under the federal constitution, the exaction must be treated as a tax on property sold. To quote:

"We attach no importance to the fact that the tax is described in the statute as a privilege or license tax;

for, where such tax is measured by sales, it is in effect a sales tax, whatever it may be called. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 222, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583. And, although not a property tax within the meaning of the South Carolina Constitution, but an excise tax *(Gregg Dyeing Co v. Tax Commission*, 166 S. C. 117, 164 S. E. 588), it must be treated as in effect a tax upon the property sold for determining questions arising under the federal constitution. *Kehrer v. Stewart*, 197 U. S. 60, 25 S. Ct. 403, 49 L. Ed. 663; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Brown v. Maryland*, 12 Wheat. 425, 6 L. Ed. 678." (Books and pages of South Carolina case supplied)

And in affirming the decree, Your Honors said:

"The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the State to be an excise tax and not a property tax. *Gregg Dyeing Co. v. Query*, 166 S. C. 117; 164 S. E. 588, decided April 13, 1931. So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales within the state were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce. 'It is elementary,' said the Court in *New Jersey Telephone Co. v. Tax Board*, 280 U. S. 338, 346, 'that a state may tax property used to carry on interstate commerce.'" *Eastern Air Transport v. Tax Commission*, 285 U. S. 147, 151-2.

There as here, it will be noted, the state supreme court had held the offending exaction not to be a property tax within the meaning of the state constitutional provision requiring uniformity of taxation, yet it was held that the analogy of the offending exaction to a property tax should be recognized in determining whether it unlawfully burdened interstate commerce.

(b-4) Compensating tax as a lieu tax.

In so far as it affects interstate commerce, the compensating tax may be viewed as a property tax for the further reason that it is in effect a tax imposed, partially at least, in lieu of property taxes. (*U. S. Express Co. v. Minnesota*, 223 U. S. 335; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450; *Pullman Co. v. Richardson*, 261 U. S. 330.) By initiative measures, the Washington voters, in November, 1932, and again, in November, 1934, limited *ad valorem* property taxation to 40 mills of assessed valuation (50% of the actual value) (ch. 4, Laws of Wash. 1933; ch. 2, Laws of Wash. 1935). While greatly reducing ordinary property taxes, these initiative measures made it necessary that the legislature find other sources of revenue (*State v. N. P. Ry. Co.*, 183 Wash. 33, 42-3). The result was the enactment of the 1935 Revenue Act (ch. 180, Laws of Wash. 1935).

Now if, as held in the three cases first above cited, a lieu tax (itself a property tax), may be measured by gross revenue (not itself a proper measure of property values; see *Johnson v. Wells Fargo & Co.*, 239 U. S. 234), surely a tax imposed in part in lieu of property taxes, of uniform application and measured by a uniform rate applied to the purchase price of all tangible personal property purchased or used within the state, should, as regards its effect on interstate commerce, be likewise viewed as a property tax.

(b-5) Placing realty and personalty in separate classes for taxation purposes, does not deny equal protection or due process.

Should it be argued that, viewed as a property tax, the sales and compensating tax measures impose a greater tax burden on personalty than upon real estate,

may we observe that the fourteenth amendment does not prevent state taxation of real estate and personal property at different rates.

"The amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property." *Home Ins. Co. v. New York*, 134 U. S. 594, 606; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 352.

"It is the usual course in tax laws to treat personal property as one class and real estate as another, and it has never been supposed that such classification created an illegal discrimination, because there might be some persons who owned only personal property, and others who owned property of both classes." *Thomas v. Gay*, 169 U. S. 264, 281.

And see Vol. 4 Encyc. U. S. Sup. Crt. Rep., pp. 393 *et seq.*, and supplement.

(c) Viewed as an excise, the compensating tax is not violative of the commerce clause.

In defense of plaintiffs' contention that the compensating tax offends the commerce clause, we cannot, we believe, furnish a more convincing brief than that contained in the following excerpt from the state supreme court's opinion in *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 321-323, wherein the tax was attacked by the owner of tangible personal property purchased in Oregon subsequent to May 1, 1935, and brought into and used in Washington:

"With reference to the commerce clause of the Federal constitution, it is well settled, of course, that the state, through its legislature, has no power to restrict or regulate interstate commerce, or to impose a tax upon an article which would place a direct burden upon such commerce. A state tax, however, on merchandise brought

into this state from another state, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful, providing the tax does not work a discrimination against merchandise because of its origin in another state.

"In *Sonneborn Bros. v. Cureton,* 262 U. S. 506, 43 S. Ct. 643, it is said:

" 'A state tax upon merchandise brought in from another state or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another state.'

"In *Bowman v. Continental Oil Co.,* 256 U. S. 642, 41 S. Ct. 606, with reference to a state law which imposed an excise tax of two cents for each gallon of gasoline sold or used, it is said:

" 'With the excise tax as imposed upon the use of gasoline by plaintiff at its distributing stations, in the operation of its automobile tank wagons and otherwise, we have no difficulty. Manifestly, gasoline thus used has passed beyond interstate commerce, and the tax can be imposed upon its use, as well as upon the sale of the same commodity in domestic trade, without infringing plaintiff's commercial rights under the Federal Constitution.'

"In the case of *Gregg Dyeing Co. v. Query,* 286 U. S. 472, 52 S. Ct. 631, 84 A. L. R. 831, the court had before it a statute of the state of South Carolina, which provided for a tax upon gasoline brought from another state, to be used and consumed in that state, and the law was sustained. Speaking with reference thereto, it was said:

" 'It imposes an exaction with respect to gasoline purchased in other states and brought into South Carolina and there placed by appellants in storage for future use within the state. By the terms of the Act, as construed by the state court and applied to these appellants, interstate commerce in relation to the subject of the tax has ended. The gasoline has come to rest within the state, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the state has the authority "to tax the products or their storage or sale." *Texas Company v. Brown,* 258 U. S. 466, 478; *Sonneborn Bros. v. Cure-*

ton, 262 U. S. 506, 519, 520; *Hart Refineries v. Harmon*, 278 U. S. 499, 501, 502. Not only may local sales of gasoline thus brought into the state be taxed, but its use as well. This was specifically determined in *Bowman v. Continental Oil Co.*, 256 U. S. 642, 648, 649. See *Hart Refineries v. Harmon, supra; Breece Lumber Co. v. Asplund*, 283 U. S. 788. There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation. *Helson v. Kentucky*, 279 U. S. 245, 252; *Eastern Air Transport v. South Carolina Tax Comm.*, 285 U. S. 147. In view of these well-established principles, we find no ground for concluding that the state could not impose the tax with respect to the gasoline of appellants which was kept within the state for use in their local enterprises.'

"Between that case and the case now before us, there does not appear to us to be any substantial distinction. The controlling underlying principle is the same. There, the gasoline came to rest within the state and was being held for use or sale. Here, the property, which was purchased in Portland, Oregon, had been delivered to the appellant in this state for use in its business, and its interstate character had ceased."

To the authorities cited by the state supreme court, may we add the following:

Hart Refineries v. Harmon, 278 U. S. 499;
Texas Co. v. Brown, 258 U. S. 466, 478;
Hinson v. Lott, 75 U. S. 148;
Breece Lumber Co. v. Asplund, 34 N. M. 643, 287 Pac. 699 (Affirmed: 283 U. S. 788);
Sheip & Co. v. Amos, 100 Fla. 863, 130 So. 699;
State ex rel. People Motorbus Co. v. Blain, 332 Mo. 582, 58 S. W. (2d) 975;
Foster & Creighton v. Graham, 154 Tenn. 412, 285 S. W. 570.

In *Breece Lumber Co. v. Asplund*, 34 N. M. 643, 287 Pac. 699, the state court sustained a gallonage tax on the "use" of gasoline brought into the state by a logging company and used in its logging operations. The judg-

ment was affirmed on authority of *Bowman v. Continental Oil Co.*, 256 U. S. 642, 648, 649 (see 283 U. S. 788).

In *Hart Refineries v. Harmon*, 278 U. S. 499, it was contended that a state law taxing the sale of gasoline brought into the state was unlawfully discriminatory because the "use" of imported gasoline was not also taxed. While holding that the tax was not unduly discriminatory for the reason urged, Your Honors held that the state might have lawfully taxed the *use* as well as the sale of gasoline imported into the state and which had come to rest there, provided there was no discrimination against the commodity because of its origin in another state. After calling attention to a Montana supreme court case apparently holding that a tax upon products shipped into the state for consumption only would be a burden on interstate commerce, this Court said (278 U. S. 501-2):

"This holding, as it was applied to the contention in the present case, seems to have been the result of a too literal reading of *Sonneborn Bros. v. Cureton*, 262 U. S. 506, which was cited as authority. In that case this court, upon a full review of the earlier cases, held that when a commodity shipped from another state had come to rest as a part of the stock in trade of the dealer, the interstate transportation was at an end, and, whether in the original packages or not, a state tax upon the commodity, either as property or upon its sale in the state, if laid on the commodity generally without regard to its origin, would not constitute a burden upon or be a regulation of interstate commerce of which the commodity had been the subject. But there is nothing in the opinion to suggest that the taxing power of the state is limited to the two kinds of taxes mentioned. Interstate transportation having ended, the taxing power of the state in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the federal constitution is concerned, be exerted in any way which the state's constitution and laws permit, provided, of course, it does not discriminate against the commodity because of

its origin in another state. That under such circumstances a tax may be imposed upon the use as well as upon the sale of the commodity in domestic trade, without coming into conflict with the commerce clause, was specifically determined in *Bowman v. Continental Oil Co.*, 256 U. S. 642, 648."

These decisions were followed in the later case of *Gregg Dyeing Co. v. Query*, 286 U. S. 472, even though (as heretofore shown) the "sale" of the gasoline was taxed under one statute and its "use" under another.

May we note that such "use" taxes may, without offending the commerce clause, be lawfully exacted for storage and withdrawal from storage even as to articles intended for use in interstate commerce. *Eastern Air Transport v. Tax Commission*, 285 U. S. 147; *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249; *Edelman v. Boeing Air Transport*, 289 U. S. 249.

Section 13 of an Alabama Revenue Act provided that before any dealer in spirituous liquors offered the same for sale within the state, such dealer "introducing any such liquors into the State for sale" should pay a tax of 50 cents per gallon.

Previous sections of the statute laid a tax of 50 cents a gallon on all liquors manufactured in the state. In *Hinson v. Lott*, 75 U. S. 148, the validity of Section 13 was challenged on the ground that it violated the commerce clause. The court, while most emphatically holding that, standing alone, such section would be void as constituting a direct burden on interstate commerce, went on to say (75 U. S. 152-3):

"But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same act of fifty cents per gallon on all whiskey and all brandy from fruits

manufactured in the state. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come in the light of these earlier sections of the act, to examine the 13th, 14th, and 15th sections, it is found that no greater tax is laid on liquors brought into the state than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the state, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the state. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states."

These decisions, it will be seen, establish the principle that a state may lawfully tax the "use" of tangible personal property brought in from other states without violating the commerce clause so long as a like tax is imposed upon the use of goods of domestic origin, and it is immaterial that the latter takes the form of a sales tax.

(d) Answer to contention that compensating tax discriminates against articles because of ultra-state origin.

In the majority opinion of the two district judges we find the following (R. 29):

"• • • It is apparent that the tax is discriminating in its incidence against articles because of their origin in other states and that the Washington act was framed for the purpose of suppressing competition from without the state."

With this conclusion we must take issue. The tax applies alike to all personal property purchased at retail and used within the state, *wherever purchased*. Section 31 of the Act (*post*, p. 38) imposes a tax on all tangible personal property purchased subsequent to April 30, 1935, and used within the state, wherever purchased. By sections 32 (c) and 33 (*post*, p. 38) an off-set is allowed of any sales or use tax already paid, either in Washington or any other state. The tax is thus of general application. The place of purchase is immaterial. The measure is not specifically directed at property brought from sister states. Had the governor exercised his veto power as to the retail sales tax (Title III, *post*, p. 37), all tangible personal property purchased in Washington would nevertheless have been subject to the 2% "use" tax.

Indeed, even with the retail sales tax provisions in full force, the use of property purchased in Washington is subject to the compensating tax although exempt from the sales tax. For instance, casual and isolated sales and sales of bread, fresh fruit and vegetables and dairy products consumed off the premises are not subject to the sales tax (Sec. 19, *post*, p. 37), yet these articles are not exempted from the operation of the compensating tax. (See sec. 32, *post*, p. 38.)

Said Judge Haney in his dissenting opinion (R. 30-31):

"I cannot agree that the tax here laid, discriminates against commodities because of their origin in another state. The statute (Ch. 180, Sec. 31, Laws of Washington, 1935), levies the tax on the use of 'any article of tangible personal property,' and makes no distinction between articles, either because of the place of their origin or place of purchase. It is applicable to articles origi-

nating or purchased within the state of Washington as well as to those originating or purchased elsewhere.

"The following section (Sec. 32(c)), exempts from taxation 'the use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States.' Section 33 provides:

" 'If any article of tangible personal property has already been subjected to a tax by this or any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed.' "

"The effect of these two latter sections together with Sec. 31 is to tax the use of all personal property, the sale or use of which has not already been taxed by any state, including Washington, to the extent of two per cent of its purchase price. I see no discrimination in such a tax. As pointed out by defendants the articles exempt under the Washington sales tax law (see Sec. 19, Ch. 180, Laws 1935), even originating in Washington are subject to the use tax, see Sec. 32, *supra*.

"As to the universal applicability of the 'use' tax, we might fairly consider the result had the Governor of Washington vetoed the sales tax (Title III, Ch. 180, Laws of 1935). Under such circumstances it seems to me conclusive that the 'use' tax provided for in Sec. 31, *supra*, would have applied to the use of all tangible personal property, irrespective of its place of origin."

It is conceded, of course, that the offending "use" tax does not attach so long as the property involved is a subject of interstate commerce. It is only after the commodity's interstate journey has finally ended and the owner has exercised over it acts of dominion, wholly foreign to its purchase or transportation, that the tax is exacted.

True, as to ultra-state purchases, the purchase price in the sister state is used to measure the tax; but only as

a yard stick, and not because interstate commerce is involved. In *Hope Gas Co. v. Hall*, 274 U. S. 284, Your Honors refused to condemn a privilege tax imposed by West Virginia on the business of producing natural gas within the state computed on the value of the gas produced "as shown by the gross proceeds derived from the sale thereof by the producer," in other states, where construed as requiring that the tax be computed on the value of the gas at the well. And see also *American Mfg. Co. v. St. Louis*, 250 U. S. 459.

Here, as in the *Hope Gas* case, the tax is measured by the best evidence of the value of the article at the place where used, namely: its purchase price wherever purchased, plus necessary cost of transportation. (Sec. 35 (a), *post*, p. 39.)

In *Texas Co. v. Brown*, 258 U. S. 466, 476, it was held that a tax levied in respect of goods of a particular kind was not to be held discriminatory as against interstate commerce merely because goods of that kind were not produced locally but were all imported from other states, Your Honors following *Askren v. Continental Oil Co.*, 252 U. S. 444.

Here, while the compensating tax, as such, applies chiefly to the use of goods of ultra-state origin, yet a similar tax measured by the same yard stick applies to substantially all goods purchased within the taxing state. Surely, here is no discrimination against interstate commerce.

(d-1) Answer to contention that compensating tax discriminates against articles because of ultra-state origin. Review of decisions cited by district court.

A case cited by the district court and principally relied upon by plaintiffs below, was *Baldwin v. Seelig*, 294 U. S. 511. With respect to this case the state supreme court said in *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 323:

"The case of *Baldwin v. Seelig*, 294 U. S. 511, much relied on by the appellant, is not controlling. There, the question was whether milk, purchased in another state and brought into the state of New York, had lost its interstate character by reason of the fact that it had been taken from the cans and bottled before being distributed to the customers, and it was held that the bottling did not take it out of interstate commerce. There, the milk had not come to rest within the state at the time of the bottling, while, here, the articles purchased in Portland, Oregon, came to rest and passed beyond interstate commerce, when they were delivered to the appellant in this state for its use."

In other words, the Vermont milk was held to have retained its interstate character both when sold in cans and when sold in bottles. Not so with plaintiffs' property here. No claim is made that the interstate journey of the articles here involved had not finally ended when the offending "use" tax was sought to be exacted.

But we submit that for other reasons *Baldwin v. Seelig* is not in point here. Surely it does not follow that because a state may not dictate the price at which imported articles shall be purchased in sister states, property whose interstate journey has ended is to be exonerated from a state "use" tax applicable indiscriminately to all property. Vermont producers and dealers might well complain of a New York statute fixing prices on goods shipped from Vermont to New York, but could they in

justice complain of a New York tax applicable alike to all goods, whether purchased in Vermont or New York? Likewise New York consumers might well complain of a New York statute fixing the minimum prices at which they could purchase goods shipped from Vermont, but on what possible theory could they be heard to claim that simply because their property was acquired in Vermont it should be exempt from a local tax imposed on the "use" of all property, wherever purchased? The commerce clause, Your Honors, was intended to prevent burdensome state restrictions on interstate trade—*not to destroy local trade, by granting exemptions and immunities with respect to goods simply because acquired in interstate commerce.*

Baldwin v. Seelig was not, we submit, intended to overrule *Gregg Dyeing Co. v. Query*, 286 U. S. 472, *Bowman v. Continental Oil Co.*, 256 U. S. 642, *Hart Refineries v. Harmon*, 278 U. S. 499, *Hinson v. Lott*, 75 U. S. 148, and other cases sustaining state "use" taxes as applied to goods purchased in other states.

The other supreme court decisions cited by the district court are *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, and *Lemke v. Farmers' Grain Co.*, 258 U. S. 50. In these cases state legislation regulating the purchase of commodities intended for shipment to other states was held offensive to the commerce clause on the theory that interstate commerce included the purchase of articles intended for interstate shipment.

These decisions, to which we may add *Shafer v. Farmers' Grain Co.*, 268 U. S. 189, probably represent the extreme limit to which this court has gone in circum-

scribing state police power as applied to articles intended for interstate commerce.

But neither these cases, nor any others cited by plaintiffs below, go to the extent of holding that the "use" of property for the purposes for which intended in the state of such property's final destination, is a part of its interstate journey, and therefore not subject to a non-discriminatory tax. As heretofore shown, the decisions of this court are quite to the contrary.

(e) Tax Commission without authority to declare purpose of compensating tax.

In its majority opinion the district court seems much impressed with the statement volunteered by the tax commission that "the primary purpose of the compensating tax is to protect the merchants of Washington from discrimination" etc. (R. 28)

While the federal courts have frequently given consideration to a legislative declaration in the act itself, and the state court's pronouncement as to the purpose of state legislation, never before, so far as we can find, has a federal court been influenced by what mere administrative officers had to say of such legislative purpose.

Of course the tax commission had no authority to declare the purpose or object of this revenue measure. The court will find this volunteered statement of the tax commission in its rules and regulations adopted October 16, 1935 (R. 34), more than six months after the passage of the act (p. 849, Laws of Wash., 1935), and after the state supreme court's decision upholding its constitutionality. (Aug. 28, 1935: 183 Wash. 317)

The tax commission being of purely statutory creation has only such powers as are expressly conferred

upon it by statute, or may properly be implied from the nature of the particular duties imposed upon it. 59 C. J. 111.

Executive construction is never resorted to save in case of ambiguity. 59 C. J. 1030. Here there is no suggestion that the meaning of the offending statute is doubtful.

While the act empowers the tax commission "to make and publish rules and regulations, not inconsistent with this act, necessary in enforcing its provisions" (Sec. 208, *post*, p. 39) obviously the commission is not, and of necessity could not be, thereby clothed with legislative authority to declare the legislature's intent in the enactment of the measure.

(f) Obvious legislative purpose not to discriminate, but rather to avoid discrimination.

Were the compensating tax imposed only with respect to property purchased within the state, the act would clearly have discriminated *in favor of* the users of property purchased elsewhere. If exacted only on the use of property purchased beyond the state's borders, the act would necessarily fall as unlawfully discriminating against the subjects of interstate commerce. But since the act applies to all articles wherever purchased, it discriminates against none, and hence cannot, we submit, be held offensive to the commerce clause.

(g) Off-set of "use" and sales taxes already paid——In practice, no such taxes would be paid in other states, since purchases would be interstate.

The tax measure provides for an off-set against the tax thereby imposed, of any sales or use tax paid in re-

spect to said article either in Washington or in any other state. (Secs. 32-3, *post*, p. 38.)

In its majority opinion, the district court seems to conclude that the compensating tax act is unlawfully discriminatory between sister states because an article purchased in a state imposing no sales or use tax would be subject to the Washington tax, while the same article might be wholly or partially exempted if purchased in a state imposing a similar tax. (R. 27)

The difficulty with this objection is that it lacks real substance. Whether a state tax in fact burdens interstate commerce must, we submit, be determined by actualities, not mere fancied academic objections. Obviously, the normal transaction by which an article purchased in one state for use in another, would be an interstate sale as to which no tax could be lawfully exacted by the state where purchased.

"It is well settled that a state cannot lay a tax upon interstate or foreign commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on. * * * Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." Vol. 7 Encyc. U. S. Sup. Crt. Reports, pp. 441-443.

Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation, and the transaction is interstate and within the protection of the commerce clause. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *A. G. Spaulding & Bros. v. Edwards*, 262 U. S. 66, 69, 70; *Flanagan v. Federal Coal Co.*, 267 U. S. 222; *Furst v. Brewster*, 282 U. S. 493, 497.

It is significant that of the approximately $900,000 worth of machinery and supplies purchased by plaintiffs in outside states for use in Washington during May and June, 1935 (R. 11), a large proportion was purchased in California, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, New Jersey, Ohio and Pennsylvania (R. 48-59), all imposing taxes on retail sales (R. 14-15), yet there is neither allegation nor proof that plaintiffs paid one penny of sales tax to any state on any of these purchases!

True, it is conceivable that in rare instances individuals might make local purchases in other states imposing a sales or use tax and later bring the property so purchased to Washington for use in that state, but this, the court judicially knows, is not the practice, and we submit that a state revenue law should not be condemned on merely assumed facts which may never in fact exist. It is highly probable that no effort would be made to collect the Washington compensating tax under such circumstances, and it will be time enough, we submit, to assail the tax measure on this ground when such attempt at collection is actually made by the state administrative officers. *Edelman v. Boeing Air Transport*, 289 U. S. 249, 253.

(g-1) Off-set of "use" and sales taxes already paid—Designed to avoid double taxation.

In so far as taxes already exacted by the state of Washington are thus off-set, the act was clearly intended to avoid double taxation. And while unquestionably two or more states may each constitutionally impose a separate tax upon the same article for the same period, yet the effect, while not technically amounting to double tax-

ation, is nevertheless so palpably unjust, that a state tax measure so framed as to avoid such onerous result, should not, we submit, be stricken down as a discrimination against sister states whose merchants may conceivably profit, and can never be injured therefrom.

Something is wrong, we submit, with a process of reasoning which condemns a tax as discriminatory because not exacted twice, even by two independent taxing sovereignties.

(g-2) Off-set of "use" and sales taxes already paid—Provision does not tend to encourage or discourage commerce with either taxing or non-taxing states.

Since the Washington purchaser is required to pay a tax equal to 2% of the purchase price either to Washington (if the article be purchased either in Washington or some other non-taxing state), or to the outside taxing state where the purchase is made, it must be apparent that the compensating tax act offers no inducement whatever for negotiating the purchase in any particular state. Such purchaser is subjected to the tax wherever the purchase be made.

In considering such claimed discrimination may we not properly consider the purchaser's attitude before and after the enactment of the offending tax measure. In the absence of the compensating tax law, the Washington purchaser proposing to make an ultra-state purchase would, other things being equal, doubtlessly choose merchants of the non-taxing state. But by removing the inducement of the Washington purchaser to choose the non-taxing state wherein to make his purchase, the enactment of the compensating tax act has actually tended to *avoid* rather than to *induce* discrimination between the taxing and non-taxing states.

(h) Tax on transportation cost to place of use as part of purchase price does not result in discrimination against interstate commerce.

Said the majority of the trial court:

"The discrimination more forcibly appears where the defendants under section 35(a) have added $21,798.43 to the purchase price of the articles as transportation costs in other states which are subject to tax under the Washington act." (R. 27.)

We fail to follow the majority's reasoning. Under the tax commission's rules and regulations the "cost of transportation" upon which the tax is computed cannot exceed the "ordinary cost of transportation of like property to a person dealing therein." (R. 10.) Obviously, were a given article purchased at the place of use, such necessary transportation cost would be included in the purchase price. Thus, the total sum by which the tax is measured is precisely the same whether the purchase be made at the place of use, or in some distant state. In either case the yardstick is the cost of the article to the purchaser *at the place of use*. Were the tax measured by cost at place of purchase—let us say, New York—the merchants of both Washington and intervening states might well, we submit, complain of the tax measure as discriminatory.

(i) Even eliminating one or both of the provisions off-setting sales or use taxes paid in Washington or other States, and taxing transportation cost to place of use, the remainder of the Act should be allowed to stand.

This, we submit, is particularly true of an Act containing a severability clause such as the one found in this revenue measure. (Sec. 212, *post*, p. 39.)

In the light of this severability clause the state supreme court, in the recent case of *Benjamin Franklin*

Thrift Stores v. Henneford, 60 Pac (2d) 86, 87 Wash. Dec. (Adv. Shts.) 390, struck a portion of the rate applicable to chain store warehouses found to be discriminatory under chapter 180, Laws of 1935, in order to sustain that portion of the rate found to be non-discriminatory.

It is the general rule that a revenue act is not invalid as a whole because it contains invalid exemptions, where the objectionable part is merely incidental to the main purpose of the act.*

Examination will show that in many of the cases cited in the foot-note no reference is made to the existence of a severability clause, from which fact it may be fairly assumed that none existed.

The case of *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, involved the validity of a state statute imposing a privilege tax on the generation and transmission of electrical energy, but which contained a provision (Section 5) exempting electricity used for pumping irrigation water. Such exemption, it was claimed, rendered

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* *Fairley v. Duluth*, 150 Minn. 374, 185 N. W. 390; *McLendon v. State*, 6 Ala. App. 19, 60 So. 406; *Davies v. Hot Springs*, 141 Ark. 521, 217 S. W. 769; *Johnston v. Long Furniture Co.*, 113 Miss. 373, 74 So. 283; *Adams v. Standard Oil Co.*, 97 Miss. 879, 53 So. 692; *Morrison v. Larkin*, 26 La. Ann. 699; *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149; *Standard Lbr. Co. v. Pierce*, 112 Or. 314, 228 Pac. 812; *N. R. Bagley Co. v. Cameron*, 282 Pa. 84, 127 Atl. 311; *Stillman v. Lynch*, 56 Utah 540, 192 Pac. 272; *Bacon Service Corp. v. Huss*, 199 Cal. 21, 248 Pac. 285; *Gulfport Bldg. & Loan Assn. v. City of Gulfport*, 155 Miss. 498, 124 So. 658; *Aetna Life Ins. Co. v. Eaton* (C. C. A.), 43 Fed. (2d) 711; *Colorado Nat. Life Assn. v. Clayton*, 54 Colo. 256, 130 Pac. 330; *State ex rel. Norwood v. N. Y. Life Ins. Co.*, 119 Ark. 314, 178 S. W. 1099; *N. W. Mut. Life Ins. Co. v. Lewis and Clarke Co.*, 28 Mont. 484, 73 Pac. 982; *Di Lustro v. Penton*, 106 Fla. 198, 142 So. 898; *Hudson v. Stuart*, 166 Miss. 339, 145 So. 611; *Union Bank & Trust Co. v. Blan*, 223 Ala. 180, 135 So. 612; *Boyd v. State*, 217 Wis. 149, 258 N. W. 330; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165.

the whole act void as discriminatory. There as here the highest state court had not passed upon the effect of eliminating the offending provision. There as here, there was a severability clause. Your Honors held that if the exemption resulted in unlawful discrimination, the exemption clause could be eliminated, and the remainder of the act would stand. The following is quoted from the opinion:

"Nor do we think the inseparability of the section from the rest of the act appears from the face of the legislation. The act itself (section 11) provides that an adjudication that any provision of the act is unconstitutional shall not affect the validity of the act as a whole, or of any other provision, or section thereof. While this declaration is but an aid to interpretation and not an inexorable command (*Dorchy v. Kansas*, 264 U. S. 286, 290, 44 S. Ct. 323, 68 L. Ed. 686), it has the effect of reversing the common-law presumption, that the Legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the Legislature would not have been satisfied with the statute unless it had included the invalid part. *Williams v. Standard Oil Co.*, 278 U. S. 235, 241, 242, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596.

"It fairly may be assumed that the Idaho Legislature, in making this declaration, had in mind every provision of the act, including section 5. The primary object of the statute under review, plainly, is to raise revenue. The exemption made by section 5 and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the Legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that, if the Legislature had expressed itself specifically in respect of the matter, it would have de-

clared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fail for lack of validity. *Field v. Clark*, 143 U. S. 649, 696, 697, 12 S. Ct. 495, 36 L. Ed. 294; *People ex rel. Alpha P. C. Co. v. Knapp*, 230 N. Y. 48, 60-63, 129 N. E. 202."

In the present case, the state Legislature enacted the off-set provision with the laudable purpose of avoiding dual taxation, even by separate sovereignties, and the tax on transportation cost to place of use with the obvious purpose of avoiding discrimination. These provisions are merely incidental to the primary object of the act, that of raising revenue. As in case of the Idaho statute, the Washington Legislature, we submit, would have preserved the tax—the vital aim of the act—even though the offending provisions "should fail for lack of validity."

(j) Trial court correctly held that plaintiffs, as independent contractors performing work and furnishing materials in construction of the Dam, were not exempted from compensating tax because a federal instrumentality.

The district court's decision on this point is, we submit, convincing. See *Silas Mason Co. v. Henneford*, 15 Fed. Supl. 958, 959-960 (R. 25-26).

May we also note that on October 26, 1936, the state supreme court, in a unanimous *en banc* decision, after an exhaustive review of the pertinent authorities, reached the same conclusion as the district court. See *Silas Mason Inc. v. State Tax Commission*, — Wash. —, 88 Wash. Dec. (Adv. Shts.) 60.

In support of our position, we need do no more, we feel, than refer to these two well-considered opinions.

For the reasons urged, we respectfully submit that the order of the statutory three-judge court granting the interlocutory injunction restraining the collection of the offending tax, should be reversed.

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APPENDIX A

Pertinent provisions of chapter 180, Laws of Washington of 1935, imposing a 2% retail sales tax and compensating tax.

Title III. Tax on Retail Sales

"SEC. 16. From and after the first day of May, 1935, there is hereby levied and there shall be collected a tax on each retail sale in this state equal to two per cent of the selling price."

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"SEC. 19. The tax hereby levied shall not apply to the following sales:

"(a) Casual and isolated sales by a person who is not engaged in the business of selling tangible personal property at retail;

"(b) Sales made by persons in the course of business activities with respect to which tax liability is specifically imposed under title V of this act, when the gross proceeds from such sales must be included in the measure of the tax imposed under said title V."

("Title V" imposes a tax measured by a percentage of gross earnings on various public service activities. See secs. 36 to 43, pp. 728-733, ch. 180, Laws of 1935.)

"(c) The distribution and news stand sale of newspapers;

"(d) Sales which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

"(e) Sales of motor vehicle fuel taxable under chapter 58 of the Laws of 1933, section 5 (being Rem. Rev. Stat., section 8327-5);

"(f) Sales made on relief vouchers issued by the department of public welfare or by any county or city or other welfare agency;

"(g) Sales of fresh sweet milk, raw unprocessed fruits and vegetables, butter, eggs, cheese, canned milk and unsweetened bread in loaf form (including rolls and buns), sold for consumption off the premises.

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"SEC. 21. The tax hereby imposed shall be paid by the buyer to the seller, and it shall be the duty of each seller to collect from the buyer the full amount of the tax payable in respect to each taxable sale. . . .

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Title IV. Compensating Tax

"SEC. 31. There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935. Such tax shall be levied and collected in an amount equal to the purchase price paid by the taxpayer multiplied by the rate of 2%.

"SEC. 32. The provisions of this title shall not apply:

"(a) In respect to the use of any article of tangible personal property brought into the State of Washington by a non-resident thereof for his or her use or enjoyment while within the state;

"(b) In respect to the use of tangible personal property purchased other than at retail;

"(c) In respect to the use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States;

"(d) In respect to the use of tangible personal property purchased during any calendar month, the total purchase price of which is less than twenty ($20.00) dollars.

"SEC. 33. If any article of tangible personal property has already been subjected to a tax by this or any other state in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed.

"SEC. 34. Each taxpayer subject to the provisions of this title shall, on or before the fifteenth day of every calendar month, file a return with the commission showing in detail the total quantity of tangible personal prop-

erty used by him within the state during the preceding calendar month subject to the tax herein imposed, and such other information as the commission may deem pertinent. Each taxpayer shall remit to the commission with each such return the amount of tax shown thereon to be due.

"SEC. 35. For the purposes of this title:

"(a) The term 'purchase price' shall mean the consideration paid or given or contracted to be paid or given by any person to the seller of an article or tangible personal property for the article purchased. The term shall include, in addition to the consideration paid or given or contracted to be paid or given, the actual cost of transportation from the place where the article was purchased to the person using the same in this state."

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Title XVIII. General Administrative Provisions

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"SEC. 208. The administration of this act shall be vested in and exercised by the tax commission which shall prescribe forms and rules of procedure in conformity with this act for the determination of the taxable status of any person, for the making of returns and for the ascertainment, assessment and collection of taxes and penalties imposed hereunder. The tax commission shall make and publish rules and regulations, not inconsistent with this act, necessary in enforcing its provisions, which rules and regulations shall have the same force and effect as if specifically included herein, unless declared invalid by the judgment of a court of record not appealed from.

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Title XX. General Provisions

"SEC. 212. If any title, section, subdivision of a section, paragraph, sentence, clause or word of this act for any reason shall be adjudged invalid, such judgment shall not affect, impair or invalidate the remainder of this act but shall be confined in its operation to the title, section, subdivision of a section, paragraph, sentence,

clause or word of the act directly involved in the controversy in which such judgment shall have been rendered. If any tax imposed under this act shall be adjudged invalid as to any person, corporation, association or class of persons, corporations or associations included within the scope of the general language of this act such invalidity shall not affect the liability of any person, corporation, association or class of persons, corporations or associations as to which such tax has not been adjudged invalid. It is hereby expressly declared that had any title, section, sub-division of a section, paragraph, sentence, clause, word or any person, corporation, association or class of persons, corporations or associations as to which this act is declared invalid been eliminated from the act at the time the same was considered the act would have nevertheless been enacted with such portions eliminated: *Provided, however,* That if the provisions of section 4 (e) shall be declared invalid as to a national banking association, state bank, mutual savings bank or building and loan or savings and loan association the provisions of said section 4 (e) shall be deemed inoperative as to all institutions of the types hereinabove mentioned."